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No. 88-1837

IN THE

Supreme Court of the United States

October Term, 1988

JOHN SMITH, *Petitioner*,

v.

JANE DOE, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner John Smith [the "Father" herein] submits this brief in reply to Respondent's [the "Mother" herein] Brief in Oppostition to the granting of a writ of certiorari in this case. The Father urges again the granting of a writ of certiorari for the reason that this is a matter of great public importance affecting a great number of people and for the reason that the principles of law set forth in the arguments of counsel for the Mother do not preclude the granting of a writ to review the action of the lower court in this case. This brief will focus primarily on the Mother's erroneous assertion that the State of Indiana has asserted no interest herein, but certain other errors should be briefly noted preliminarily.

First, in Respondent's Counterstatement of Question Presented, she refers to a "motion by a man *claiming* to have caused the woman's pregnancy." R.B. i (emphasis added).[1] This is a misleading statement of the facts. The trial court explicitly *found* in its Findings of Fact that John Smith *is* the father of the unborn child of Jane Doe in the paternity action.

Second, counsel for the Mother allege that "[t]he court relied solely on Mr. Smith's testimony in making the unsubstantiated finding" of the reasons why the Mother desired an abortion and that the trial court relied "on nothing more than his own purely subjective observations and personal beliefs" in "attempting to balance" the competing interests. R.B. 4, 8. This is not a fair characterization of the record, as other testimony on the issue of the Mother's reasons for seeking an abortion was given by Witness A, R. 99, and Witness B, R. 109.[2] Moreover, the trial court received uncontroverted testimony from the Father concerning reasons why the Mother desired an abortion in a judicial hearing at which the finder of fact was able to observe the demeanor of the witness. Counsel for the Mother seek to have this Court reweigh the evidence and thereby disregard the Trial Court's Findings of Fact without any showing that there was not substantial evidence to support them. Rather, the Mother resorts to statements based on only a part of the record in an attempt to confuse this Court as to the facts of this case.[3]

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[1]References to documents in this case will employ the following abbreviations: the record is R.; Respondent's Brief in Opposition is R.B.; the Appendix to the Petition for a Writ of Certiorari is P.A.

[2]For the sake of anonymity, witnesses will be identified by letter in the order in which they testified.

[3]Counsel for the Mother also assert that "[t]here is no reason to believe that the state would seek to promote the interest asserted by Mr. Smith at the expense of Ms. Doe's right to life and liberty." R.B. 10. While *Roe v. Wade*, 410 U.S. 113 (1973), recognized a liberty interest in abortion, there is no evidence in the record that the Mother's life was at risk. An appeal to her right to life, therefore, is inappropriate.

Third, counsel for the Mother argue that testimony concerning the sexual activity of the Father and the Mother was inappropriate and amounted to a violation of the Mother's right of privacy. R.B. 4. The hearing, at which this testimony was given, was closed by law and the record sealed. Such testimony is standard fare in paternity actions, wherein paternity is often established on the basis that the couple engaged in sexual intercourse at the time when conception probably occurred. *H.W.K. v. M.A.G.*, 426 N.E.2d 129 (Ind. App. 1981).

The ramification of the Mother's claim that testimony regarding sexual activity in paternity cases is forbidden by the right of privacy is grave. Paternity actions would virtually cease to exist. Millions of women, seeking to establish paternity and gain support for their offspring, would be barred from eliciting testimony of sexual intercourse with the putative father and, thus, would be prevented from establishing paternity. While Indiana provides for a father to bring a paternity suit to establish paternity, as was done in this case, the vast majority of paternity actions are brought by women. Under the Mother's scheme of barring testimony as to sexual intimacies — on alleged privacy grounds — those primarily penalized would be women and children.

Fourth, counsel for the Mother assert that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), control this case. As this has already been adequately dealt with in the Father's Petition for Certiorari, the arguments will not be repeated here.

I. THE STATE OF INDIANA HAS ASSERTED ITS INTEREST IN PROTECTING THE INTERESTS OF FATHERS IN THEIR UNBORN CHILDREN, ALTHOUGH SUBSTANTIVE DUE PROCESS ANALYSIS REQUIRES ONLY THAT THERE BE A COMPELLING INTEREST, NOT THAT THE STATE ASSERT IT IN ANY PARTICULAR FASHION.

A. THE STATE OF INDIANA HAS ACTED THROUGH ITS COURTS TO PROTECT THE INTERESTS OF FATHERS IN THEIR UNBORN CHILDREN.

Counsel for the Mother allege that "Indiana has never even asserted" its interest in protecting the interests of fathers in their unborn children. R.B. 9.

By this assertion, opposing counsel have placed themselves on the horns of a dilemma. If Indiana has not acted to protect the interests of fathers in their unborn children, then no state action exists and the Mother's Fourteenth Amendment right may not be asserted against the trial court's injunction, as she has done in seeking to shield herself behind *Roe*. If *Roe* is applicable in any way, it is only because the State of Indiana has acted through its courts. Because counsel for the Mother insist that *Roe* controls this case, they logically have conceded that the State of Indiana has acted to protect the interests of fathers in their unborn children.

Ironically, counsel for the Mother have already argued this point themselves. In their brief before the Indiana Court of Appeals, they included an extended discussion entitled, "The Juvenile Court's Order Is State Action." Brief of Appellant at 45-50. In that brief, counsel for the Mother declared:

> It makes no difference whether the operative state actor is the legislature, the executive or the judiciary. 'A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way.' *Ex Parte Virginia* (1880), 100 U.S. 339, 347, *quoted in*, *Shelley v. Kramer* (1948), 334 U.S. 1, 14. The federal constitutional right of the woman is well established, and any infringement of the right by a state actor, including a judge, is state action and actionable as a violation of the Constitution.
>
> As Professor Tribe has explained, '[t]he general proposition that common law is state action — that is, that the state "acts" when its courts create and enforce common law rules — is hardly controversial.[.]' *American Constitutional Law*, [*sic*] 1711 (2d ed. 1988).

Id. at 45-46.

Now counsel for the Mother seem to argue that the action of a legislature is state action but the action of a state court is not. They assert that, because an Indiana court has acted on behalf of the State to protect the interests of a father in his unborn children but the General Assembly has not done so by statute, the State has not asserted its interest in protecting the interests of fathers of unborn children. This assertion is absurd.

Moreover, it is erroneous that the Indiana General Assembly and the Indiana appellate courts have supported *Roe* and its progeny as a matter of state policy. Counsel for the Mother have presented Indiana's compliance with the dictates of this Court, in its abortion cases, as evidence of Indiana's support for abortion on demand and disregard for the interests of fathers whose children are endangered by an abortion decision. R.B.9-10.

The Indiana General Assembly in Acts 1973, P.L. 322, from which Indiana's current abortion statute, Ind. Code. Ann. §35-1-58.5-1 to 8 (West 1986), is derived contained the following statement:

> It is not the intent of the Indiana General Assembly, in enacting this legislation, to acknowledge that there is a constitutional right to abortion on demand or to indicate that it approves of abortion, except to save the life of the mother. The General Assembly is, however, controlled to a certain extent by recent Supreme Court decisions and this legislation is an attempt to abide by those decisions to the extent necessary.
>
> . . . .
>
> No individual may be permitted an abortion when the interest of that individual is outweighed by the express interests of the state in protecting the potentiality of human life.

This provision was explicitly saved from repeal by Ind. Code. Ann. §1-1-1-2 (West 1986), when prior sections of the Indiana law were repealed pursuant to ongoing statutory revision.

It is clear, then, that the Indiana General Assembly has *not* "unfailingly accepted this Court's decisions in *Roe* and *Danforth*," as counsel for the Mother insists. R.B. 9. Rather, the Indiana General Assembly clearly expressed its sense of obligation to follow *Roe* despite its disapproval of that decision. Further, the General Assembly has expressed its determination to deny abortions, where possible, when the rights of the mother are "outweighed" by the State's interests in unborn human life.

Nor may it be said that the state appellate courts have endorsed *Roe* in any way. If they have "unfailingly" followed *Roe*, it is because of their respect for the precedents of this Court and not because of any state policy of supporting abortion or denying protection for the interests of fathers in their unborn children. The Indiana appellate court, in the present case, P.A. 1a-3a, merely followed the Indiana Supreme Court's holdings in *Conn v. Conn*, 525 N.E.2d 612 (Ind. 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347) (dissent of Pivarnik, J., published at 526 N.E. 2d 958 (Ind. 1988)), and *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988). The *John Doe* case relied on the Indiana Supreme Court's holding in *Conn*, which in turn relied solely on federal constitutional law. This may be seen from the following quotation from the opinion in that case:

> Dispositive of this case are the decisions of the Supreme Court of the United States in *Roe v. Wade* . . . and *Planned Parenthood of Central Missouri v. Danforth*. . . .
>
> . . . .
>
> Pursuant to the express holding in *Danforth*, we hold that [the father] has no right to veto [the mother's] decision to obtain an abortion. . . .

Conn, 525 N.E.2d at 613, 616 (citations omitted).

However, the Indiana Supreme Court — while feeling bound by *Roe* — has itself rejected the proposition that a right to

abortion is constitutionally mandated. This was made clear by the Indiana Supreme Court in the case of *Cheany v. State*, 259 Ind. 138, 285 N.E.2d 265 (1972), which rejected a claim that the Indiana Abortion Law, which allowed abortion only to save a life of the mother, was unconstitutional because of a federal constitutional "fundamental right to privacy which includes the woman's right to decide whether to bear an unquickened fetus." *Id.* at 266-67. The Indiana Supreme Court held "that a State interest in what is, at the very least, from the moment of conception a living being and potential human life, is both valid and compelling." *Id.* at 267.

B. SUBSTANTIVE DUE PROCESS ANALYSIS REQUIRES ONLY THAT THERE BE A COMPELLING INTEREST, NOT THAT THE STATE ASSERT IT IN ANY PARTICULAR FASHION.

Given that the State of Indiana has acted through its courts to protect the interests of fathers in their unborn children, the next step of a substantive due process analysis is to determine whether a sufficiently compelling interest exists to allow the state action to pass constitutional muster. Counsel for the Mother attempt to confound this analysis by requiring that the compelling state interest be asserted by the State in only a certain manner — legislatively — and that this legislative assertion of a compelling state interest be done in advance of any constitutional defense of state action before a tribunal. This is not the law.

The case of *Palmore v. Sidoti*, 466 U.S. 429 (1984), demonstrates that a state court may assert the interests of a state in a manner sufficient for review by this Court. In *Palmore*, a Florida trial court removed a child from her divorced mother, who had cohabited with and then married a black man, and granted custody of the child to the child's biological father, the former husband of the mother. The trial court gave as its reason for the change of custody the "social stigmatization" which the child would suffer as a result of living in such an interracial household. *Id.* at 431. The Florida Court of Appeal affirmed.

This Court reversed the holding of the Florida Court of Appeal as a violation of the Equal Protection Clause of the United States Constitution. *Id.* at 433. Because this Court decided the matter on equal protection principles, it did not reach or resolve the substantive due process claim asserted. *Id.* at 433 n.2. However, the principle applicable in the case at bar is the same under ~~either~~ theory, namely, that this Court will consider state interests in a constitutional rights analysis where only a state court has acted.

The *Palmore* Court first noted that there was state action: "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Id.* at 432 n.1 (citations omitted). This Court then proceeded to analyze the "substantial governmental interest" of the state in granting custody based on the best interests of the child. *Id.* at 433.

For present purposes, three crucial comparisons between *Palmore* and the case at bar should be noted. First, in *Palmore* the State of Florida was not involved in the case, just as the State of Indiana has not chosen to intervene in the present case. Second, in *Palmore* the trial court acted pursuant to a general custody statute, providing for custody determination based on the best interests of the child. The statute did not expressly authorize custody determinations based on racial stigma, so that the actual state action under review was that of the trial court, and not the legislature, although the trial court was acting under authority of a generally applicable state statute. Likewise, the trial court in the present case acted pursuant to a general statute authorizing paternity determinations at the initiative of fathers and pursuant to injunctive powers authorized in the statute.[4] As in *Palmore*, the statute

[4]Indiana Code §31-6-6.1-2 and 7 permit an expectant father of an unborn child to file an action to establish his paternity. Further, Indiana Code §31-6-7-14(a)(1) provides:

> Upon its motion or upon the motion of the child, the child's parent, guardian, custodian, or guardian *at litem*, . . . or any person providing

did not expressly authorize the specific basis for action employed by the trial court, but granted general powers to the court to make determinations "for good cause shown." Third, in *Palmore* this Court did not hesitate to consider the interests of the state in its rights analysis, despite the fact that the state had not intervened and the statute did not expressly encompass consideration of racial stigma. Likewise, in the instant case, this Court should consider the interests which all states have in protecting the interests of fathers in their children as declared by this Court and as recognized generally by Indiana in its paternity statute and in its history of aversion to *Roe* and its progeny. No special form of assertion is required for state interests to be considered by this Court, nor must the assertion be done by any particular state entity. Substantive due process analysis asks not *who* has asserted the interest but *whether* an interest sufficiently compelling exists to support the action of the state actor.

services to the child or his parent, guardian, or custodian, the juvenile court may, for good cause shown upon the record issue an injunction:
(1) to control the conduct of any person in relation to the child. . . .

In deciding this case, the Indiana appellate courts found no flaw with the injunction issued to prevent the abortion under this statute or any state law, but only under their erroneous understanding of *Roe* and its progeny.

CONCLUSION

WHEREFORE, as this case presents a matter of great public importance which affects a great number of persons, and which has been wrongly decided below on the basis of an erroneous interpretation of the decisions of this Court, and the review of which is not precluded by any principles of law argued in Respondent's Brief in Opposition, Petitioner John Smith respectfully requests this Court to issue a writ of certiorari to review the decision of the Indiana Court of Appeals.

Respectfully submitted,

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